89-522

NO. _____

IN THE

Supreme Court of The United States

OCTOBER TERM, 1989

RONALD L. POWELL, COMMISSIONER,
DEPARTMENT OF CORRECTIONS,
and
MICHAEL CUNNINGHAM, WARDEN,
NEW HAMPSHIRE STATE PRISON
Petitioners

v.

VINCENT COPPOLA,
Respondent

Petition For a Writ of Certiorari
to the
United States Court of Appeals
For the First Circuit

THE STATE OF NEW HAMPSHIRE
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QUESTIONS PRESENTED FOR REVIEW

I. Whether a prearrest, pre-*Miranda* invocation of the right to remain silent may be used against the accused in the government's case-in-chief.

II. Whether a State court's determination that a defendant waived his right to remain silent is factual and thus entitled to a presumption of correctness under 28 U.S.C. §2254(d).

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Petitioners,

v.

VINCENT COPPOLA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The New Hampshire Attorney General, on behalf of the State of New Hampshire, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 878 F.2d 1562. The opinion of the district court (App., *infra*, 22a-24a) is unreported. The opinion of the New Hampshire Supreme Court (App., *infra*, 25a-36a) is reported at 130 N.H. 148 and 536 A.2d 1236.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1989 (App., *infra*, 37a), and a petition for rehearing *en banc* was denied on August 15, 1989. (App., *infra*, 38a-39a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). This petition is filed within 60 days of the date of denial of the petition for rehearing *en banc*.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

28 United States Code §2254; New Hampshire Revised Statutes Annotated 632-A:2 and 635:1.

STATEMENT OF THE CASE

Jessica Hodgins, 46 years old, lived alone in Epsom, New Hampshire. (Trial Transcript [hereinafter T.], pp. 44, 46). Shortly after midnight on January 25, 1986, she was awakened by a noise at her front door. (T., p. 63). When Ms. Hodgins went to investigate, she saw a hand break through a glass panel in her front door, unfasten the lock and open the door. (T., pp. 63-64). After a struggle, Ms. Hodgins was overpowered and her assailant forcibly engaged in cunnilingus and sexual intercourse with her. (T., pp. 64-67).

After about 30 minutes, the assailant left with a threat to further harm Ms. Hodgins if she reported the crime. (T., pp. 68, 71). Ms. Hodgins immediately called the police. (T., p. 69). Based on her description of the assailant, police suspicion focused on the Respondent, Vincent Coppola. (T., pp. 122-23).

The police spoke with the Respondent at his house that same morning. (T., pp. 327, 331). Three days later, after further investigation, the police returned to the Respondent's house and asked to speak with him again. (T., pp. 615-16). The Respondent replied:

> Let me tell you something. I'm not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. And if you think I'm going to confess to you, you're crazy.

It is this statement, made when the Respondent was not in custody (and accordingly without the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966)) that is at issue here. Immediately following the 'country bumpkin' statement, the

Respondent asserted that he would not speak to the police without a lawyer present. He further threatened to bring legal action against the police, and then launched into a lengthy account of his actions on the night of the assault. (T., pp. 596-601).[1]

The Respondent was later arrested, charged with Burglary and two counts of Aggravated Felonious Sexual Assault, and incarcerated before trial. (T., p. 625). While in jail, he made incriminating statements to three inmates. (T., pp. 468-69, 486, 492, 497, 549). When one inmate directly asked the Respondent whether he had raped the victim, he replied "What did I have to lose?" (T., p. 550).

The Respondent received a jury trial in Merrimack County Superior Court. Following an *in camera* hearing and over the Respondent's objection (T., pp. 585-606), the court admitted evidence of his prearrest 'country bumpkin' speech to police. (T., p. 606). The jury convicted the Respondent of all three offenses with which he was charged.

The Respondent appealed to the New Hampshire Supreme Court claiming, *inter alia*, that the trial court erred in admitting his 'county bumpkin' speech into evidence. On December 7, 1987, the New Hampshire Supreme Court affirmed his convictions, but remanded the case for a reconsideration of the sentence for reasons unrelated to the issues raised in this petition. *State v. Coppola*, 130 N.H. 148, 536 A.2d 1236 (1987). (App., *infra*, 25a-36a). The New Hampshire Supreme Court found that the Respondent did not invoke his right to remain

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[1] The Respondent's refusal to speak without a lawyer present and his threat of legal action against the police were not introduced at trial. (T., p. 606). His account of his actions was admitted into evidence without objection. (T., pp. 617-21).

silent when he taunted the police about his sophistication. *Coppola*, 130 N.H. at 152-53, 536 A.2d at 1239 (App., *infra*, 31a).

On September 8, 1988, the Respondent filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 with the United States District Court for the District of New Hampshire. The court (Loughlin, J.) denied the petition, agreeing with the State courts that the Respondent's 'country bumpkin' speech was not an attempt to assert the privilege against self-incrimination. *Coppola v. Powell*, No. C88-373-L (D.N.H. Nov. 30, 1988) (Order on Motion to Dismiss) (App., *infra*, 22a-24a).

The Respondent appealed to the United States Court of Appeals for the First Circuit. On July 14, 1989, that court reversed the decision of the district court. It held that (1) "[b]ecause the admissibility of the statement is akin to the questions of the admissibility of a confession, it 'merits treatment as a legal inquiry requiring plenary federal review'" *Coppola v. Powell*, 878 F.2d at 1564 (citation omitted) (App., *infra*, 7a); (2) the Respondent's statement invoked his privilege against self-incrimination, *id.* at 1567 (App., *infra*, 12a); (3) prearrest, pre-*Miranda* silence or invocation of the privilege against self-incrimination may not be used in the government's case-in-chief, *id.* at 1567-68 (App., *infra*, 13a-15a); and (4) the admission of the Respondent's statement into evidence was not harmless beyond a reasonable doubt. *Id.* at 1569-71 (App., *infra*, 16a-21a).

The Petitioners herein timely filed a Petition for Rehearing *En Banc*, which the court of appeals denied on August 15, 1989 (App., *infra*, 38a-39a).

REASONS FOR GRANTING THE WRIT

This Court should review the decision below because it conflicts with decisions of other federal courts of appeals on two issues of fundamental importance in the criminal justice arena.

1. Conflict with decisions of other federal courts of appeal — use of accused's pre-*Miranda* silence in government's case-in-chief.

The United States Court of Appeals for the First Circuit ruled in the instant case that a prearrest, pre-*Miranda* invocation of the right to remain silent may not be used in the government's case-in-chief. This decision squarely conflicts with decisions of other federal courts of appeal on the same matter. *United States v. Rederth*, 872 F.2d 255, 257-58 (8th Cir. 1989) (absent affirmative assurances to a suspect from the government that silence will not be used against him, evidence of silence may be used in the government's case-in-chief); *United States v. Harrold*, 796 F.2d 1275, 1279 (10th Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987) (accord). *Contra United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987); *United States v. Sprengel*, 103 F.2d 876, 883 (3d Cir. 1939). The First Circuit's ruling was wrong, and should be reversed.

The decision by the court of appeals here was inconsistent with this Court's decisions in cases involving the use at trial of a defendant's silence. Since *Doyle v. Ohio*, 426 U.S. 610 (1976), this Court has made clear that what offends our sense of fair play — and what due process forbids — is the use at trial of silence that was induced by the assurance implicit in *Miranda* warnings that silence will carry no penalty. *Wainwright v. Greenfield*, 474 U.S. 284 (1986); *Fletcher v. Weir*, 455 U.S. 603 (1982); *Jenkins v. Anderson*, 447 U.S. 231 (1980). The unfairness condemned by *Doyle* and its progeny is simply that

which arises when, at trial, the government reneges on this earlier promise. *See also South Dakota v. Neville*, 459 U.S. 553 (1983) (admission of evidence that a defendant refused to submit to a blood-alcohol test admissible in government's case-in-chief, because State had not promised to forego use of refusal evidence).

This Court has never directly addressed the question raised by this case — that is, whether pre-*Miranda* silence or invocation of the right to remain silent may be introduced in the prosecution's case-in-chief. *Doyle* and *Wainwright* concerned the use of post-*Miranda* silence, while *Fletcher* and *Jenkins* dealt with the use of pre-*Miranda* silence to impeach a defendant who takes the stand at trial. Acceptance of this case would allow this Court to resolve a conflict in the courts of appeal and ensure that this probative, fairly obtained evidence is not kept from the finder of fact.

The Respondent's 'country bumpkin' statement was not induced by any implicit or explicit assurances that it would not be used against him at trial. The Respondent was at home and not in custody at the time he made the statement, and accordingly the police did not give him his *Miranda* warnings. Contrary to the First Circuit's ruling, there was no unfairness in using this statement against the Respondent in the government's case-in-chief.

2. Conflict with decisions of other federal courts of appeals — standard of review of State court determinations of invocation or waiver of the right to remain silent.

The United States Court of Appeals for the First Circuit erred in according plenary review to the State courts' factual finding that the Respondent waived his right to remain silent. There is a division between federal courts of appeal on the

proper standard for reviewing determinations concerning invocation or waiver of the right to remain silent. Although this question has arisen in the context of reviewing waivers of *Miranda* rights, the issue posed by the instant case is the same — that is, whether the determination that an accused has waived his right to remain silent is a factual one, entitled to a presumption of correctness under 28 U.S.C. §2254(d), *Bryan v. Warden, Indiana State Reformatory*, 820 F.2d 217, 219 (7th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 190 (1987); *Nelson v. McCarthy*, 637 F.2d 1291, 1295-96 (9th Cir. 1980), *cert. denied*, 451 U.S. 940 (1981), or whether it is a mixed question of law and fact subject to plenary review by federal habeas courts. *Ahmad v. Redman*, 782 F.2d 409, 413 (3d Cir.), *cert. denied*, 479 U.S. 831 (1986); *Finney v. Rothgerber*, 751 F.2d 858, 862 (6th Cir.), *cert. denied*, 471 U.S. 1020 (1985).

Whether an accused has invoked or waived his right to remain silent has all the hallmarks of a factual determination entitled to a presumption of correctness in subsequent collateral attacks. The State courts have necessarily drawn inferences from objective facts and circumstances in order to determine the intent of the accused. The State courts are in the best position to evaluate the testimony and the credibility of the witnesses.

The First Circuit erroneously relied on *Miller v. Fenton*, 474 U.S. 104 (1985) in reviewing *de novo* the State courts' finding that the Respondent did not invoke his right to remain silent. Although *Miller* holds that the voluntariness of a confession merits plenary federal review, it does not stand for the proposition that all questions concerning the admissibility of an accused's statement require plenary review.

Miller expressly left open the question of whether the statutory presumption of correctness applies to state court findings concerning the validity of a waiver of Fifth Amendment

rights. *Id.* at 108, n. 3. Subsequent decisions of this Court have suggested that the statutory presumption of correctness does apply. *See Connecticut v. Barrett*, 479 U.S. 523 (1987) (Court relies upon State court finding that *Miranda* waiver was voluntary without engaging in *de novo* review). The case at bar would provide this Court an opportunity to definitively resolve this issue.

Had the court of appeals applied the proper standard of review in this case, the factual determination of the State courts, and the Respondent's conviction, would have been upheld. The State courts, after reviewing the substance of the Respondent's remarks as well as the surrounding circumstances, found that his statement was simply a boast that, try as they might, the police were not going to get him to say anything incriminating. As the New Hampshire Supreme Court found, the Respondent was not telling the police that he would not say *anything*. Rather, he was telling them that he would not say anything *inculpatory*. *State v. Coppola*, 130 N.H. at 152-53, 536 A.2d at 1239 (App., *infra*, 31a). The Respondent's 'country bumpkin' speech was thus an implicit admission of guilt which the jury was entitled to hear.

This factual determination was fairly supported by the record. The Respondent made his taunt in a "hostile" and "bragging" tone. (T., p. 617). He proceeded to give the police a lengthy account of his actions on the night in question. (T., pp. 617-21). In fact, the Respondent talked so much and so freely that the police did not have a chance to ask more than one or two questions. (T., p. 603). Even after his arrest, the Respondent constantly bragged about the crime he had committed as well as about his ability to outwit the State. (T., pp. 467-68, 485-86, 497, 512, 549-51).

Acceptance of this case will not only clear murky legal waters, but also correct the injustice of letting an admitted rapist go free.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD L. POWELL, COMMISSIONER,
DEPARTMENT OF CORRECTIONS,
and
MICHAEL CUNNINGHAM, WARDEN,
NEW HAMPSHIRE STATE PRISON,
Petitioners

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Vincent COPPOLA,
Petitioner, Appellant,

v.

Ronald L. POWELL, etc., et al.,
Respondents, Appellees

No. 89-1109.

United States Court of Appeals,
First Circuit.
Heard May 3, 1989.
Decided July 14, 1989.

Defendant, who had been convicted of sexual assault and whose conviction was affirmed by the New Hampshire Supreme Court, 130 N.H. 148, 536 A.2d 1236, petitioned for writ of habeas corpus. The United States District Court for the District of New Hampshire, Martin F. Loughlin, J., denied the petition. Appeal was taken. The Court of Appeals, Bownes, Circuit Judge, held that: (1) the defendant's prearrest statement that he would not confess was sufficient to invoke the privilege against self-incrimination; (2) the prearrest statement was not admissible in the prosecutor's case-in-chief; and (3) the erroneous admission of the statement could not be deemed harmless.

Decision reversed.

1. Witnesses 297(1)

Liberal construction must be given to person's attempt to invoke privilege against self-incrimination. U.S.C.A. Const. Amend. 5.

2. Criminal Law 412.1(1)

No special words must be chosen to invoke privilege against self-incrimination; rather, entire context in which person spoke must be considered. U.S.C.A. Const. Amend. 5.

3. Criminal Law 412.1(4)

Application of privilege against self-incrimination is not limited to persons in custody or charged with crime; rather, privilege may be asserted by suspect who is questioned during investigation of crime. U.S.C.A. Const. Amend. 5.

4. Criminal Law 412.1(1)

Defendant's prearrest statement that he would not confess was sufficient to invoke privilege against self-incrimination; fact that defendant used "boastful" and "arrogant" words did not change plain meaning of words into anything other than invocation of right to remain silent. U.S.C.A. Const. Amend. 5.

5. Criminal Law 412(4)

Defendant's prearrest statement indicating that he would not confess was not admissible in prosecutor's case-in-chief in sexual assault prosecution; defendant stated to police that he was not going to confess, he followed that with statement that he would not answer any question without lawyer present, and he did not later take stand and offer exculpatory statement that could have been impeached by his prearrest statement. U.S.C.A. Const. Amend. 5.

6. Criminal Law 1169.12

Admission of nontestifying defendant's prearrest statement to police that he would not confess was not harmless error in sexual assault prosecution; although evidence, excluding statement, indicated that it was probable that defendant committed crime, statement may have been "clincher" in jury's deliberations and, thus, was not harmless. U.S.C.A. Const. Amend. 5.

James E. Duggan, Chief Appellate Defender, Appellate Defender Program, Franklin Pierce Law Center, for petitioner, appellant.

Tina Schneider, Asst. Atty. Gen., Criminal Justice Bureau, with whom John P. Arnold, Atty. Gen., was on brief, for respondents, appellees.

Before BOWNES and BREYER, Circuit Judges, and GRAY,* Senior District Judge.

BOWNES, Circuit Judge.

Petitioner Vincent Coppola was convicted by a jury in New Hampshire Superior Court, Merrimack County, on one count of burglary and two counts of aggravated felonious sexual assault. The New Hampshire Supreme Court affirmed his convictions holding, *inter alia*, that petitioner's prearrest, precustodial statement to the police was not an invocation of his constitutional right to remain silent and was properly received into evidence for use in the prosecution's case in chief. *State v. Coppola*, 130 N.H. 148, 152-153, 536 A.2d 1236, 1239 (1987). Coppola's petition for a writ of habeas corpus pursuant to 28 U.S.C.§ 2254 was denied by the United States District Court for the District of New Hampshire. *Coppola v. Powell*, No. C88-373-L (D.N.H. Nov. 30, 1988) (order on motion to dismiss). A certificate of probable cause pursuant to 28 U.S.C.§ 2253 was granted and petitioner brings this appeal. We reverse.

I. FACTS

Shortly after midnight on January 25, 1986, Jessica Hodgins was awakened by a thumping sound at her front door. She got up to investigate the noise and remained standing in her living room near the door. She saw a hand break through a glass window and reach in to unlock and open the door. A man then entered her house and overpowered her, dragging her into the

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*Of the Central District of California, sitting by designation.

bedroom where he raped her. Approximately one half hour after his arrival the man left and Mrs. Hodgins called the police.

When the state police arrived at her home Mrs. Hodgins gave a detailed description of her assailant. She also remembered seeing a "little dark foreign car" parked on the road across from her house. A local police officer on his way to the crime scene reported that he saw a small burgundy compact car heading away from the area at 12:52 a.m. The officer identified the first three digits of the license plate and saw the driver had a mustache.

Because this information led the police to consider petitioner a suspect, state and local police officers went to petitioner's residence and questioned him shortly after 2:30 a.m. on the day of the crime.

Three days later, on the evening of January 28th, two state troopers returned to petitioner's home. One of the troopers "asked [petitioner] if he'd be willing to talk to us." Petitioner replied, "Let me tell you something. I'm not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. And if you think I'm going to confess to you, you're crazy."

Petitioner was arrested six weeks later, charged and tried. He did not testify at his trial; he was found guilty.

II. PROCEDURAL FACTS

Petitioner's statement that he was not a country bumpkin and that the police were crazy to think he would confess was presented for a ruling on admissibility at an *in camera* hearing during his trial in state court. The statement had been recorded and included, along with other statements made by petitioner, in the state trooper's written report of what was

said at petitioner's home on January 28th. The prosecution introduced the statement through the testimony of the trooper who recorded it.

The pertinent *in camera* testimony of the trooper is as follows:

Direct Examination:

Q Okay. Tell us what happened.

A Well, I asked him if he'd be willing to talk to us. And at this time, he said to me, "Let me tell you something. I'm not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. And if you think I'm going to confess to you, you're crazy."

Q And what tone of voice did he use in communicating that statement to you?

A It was fairly hostile, and he appeared to be in a bragging tone when he was telling me how he grew in Providence, Rhode Island.

Q What happened then?

A Well, I said to him, "I just want to give you your rights and then talk to you."

And at this time he said that he would not talk to me without a lawyer.

Cross Examination:

Q So when you went up to his house on the 28th of January, the reason that you went there was to elicit a confession from Vinnie, right?

A That's [sic] was my ultimate goal, that's correct.

...

Q And that statement told you he wasn't going to make a statement and confess to you, right?

A That's what he said.

The trial judge allowed the trooper to testify as to what petitioner said, as well as to his "bragging tone of voice." The testimony about the request for counsel was excluded by the judge because of its potentially prejudicial effect on the jury.

The admissibility of the trooper's testimony concerning petitioner's statement was one of two evidentiary issues bearing on the question of guilt[1] before the New Hampshire Supreme Court on appeal. The other issues bore only on the sentence. In affirming petitioner's conviction, the court gave its interpretation of petitioner's statement.

> A more significant flaw, however, infecting each of the defendant's lines of reasoning, is the factual unreality of equating his taunt to the police with an invocation of his constitutional right to remain silent. If he had couched his refusal in terms of speech versus silence, it might be arguable that he was claiming a constitutional warrant for his action. But his statement cannot be read as a mere assertion that he, unlike a bumpkin, would not talk; he claimed, rather, that the police were crazy to think that someone of his sophistication would confess. By describing his choice as a refusal to confess, he implied that he had done something to confess about. It was this implication that took the de-

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[1] The other issue concerned the admission of the victim's statement to the police under the excited utterance exception to the hearsay rule.

> fendant's retort outside the realm of allusions to the fifth amendment and affirmatively indicated his consciousness of guilt.

Coppola, 130 N.H. at 152-53, 536 A.2d at 1239.

The federal district court agreed with the New Hampshire Supreme Court and granted respondent's motion to dismiss the petition for a writ of habeas corpus.

The issue before us is whether the admission of petitioner's statement for use in the prosecution's case in chief placed an unconstitutional burden on the exercise of petitioner's fifth amendment privilege not to incriminate himself. Because the admissibility of the statement is akin to the question of the admissibility of a confession, it "merits treatment as a legal inquiry requiring plenary federal review." *Miller v. Fenton*, 474 U.S. 104, 115, 106 S.Ct. 445, 452, 88 L. Ed.2d 405 (1985).

III. APPLICABLE FIFTH AMENDMENT PRINCIPLES

[1] We start our analysis by referring to three basic legal principles that have animated the application of the fifth amendment privilege against self-incrimination. The first principle is that invocation of the right must be given a liberal construction.

> This guarantee against testimonial compulsion, like other provisions of the Bill of Rights, "was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed." *Feldman v. United States*, 322 U.S. 487, 489 [64 S.Ct. 1082, 1083, 88 L.Ed. 1408] (1944). This provision of the amendment must be accorded liberal construction in favor of the right it was intended to secure. *Counselman v. Hitchcock*, 142 U.S. 547, 562 [12 S. Ct. 195,

197-198, 35 L.Ed. 1110] (1892); *Arndstein v. McCarthy*, 254 U.S. 71, 72-73 [41 S.Ct. 26, 29, 65 L.Ed. 138] (1920).

Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951); *accord, In re Brogna*, 589 F.2d 24,27 (1st Cir. 1978); *In re Kave*, 760 F.2d 343,354 (1st Cir. 1985). "This constitutional protection must not be interpreted in a hostile or niggardly spirit." *Ullmann v. United States*, 350 U.S. 422,426,76 S.Ct. 497, 500, 100 L.Ed. 511 (1956). "[E]ven the most feeble attempt to claim a Fifth Amendment privilege must be recognized. . . ." *United States v. Goodwin*, 470 F.2d 893, 902 (5th Cir. 1972), *cert. denied*, 411 U.S. 969, 93 S.Ct. 2160, 36 L.Ed. 2d 691 (1973).

[2] The second principle against self-incrimination does not turn on a person's choice of words. "It is agreed by all that a claim of the [fifth amendment] privilege [against self-incrimination] does not require any special combination of words." *Quinn v. United States*, 349 U.S. 155, 162, 75 S.Ct. 668, 673,99,L.Ed. 964 (1955).

> [N]o magic language or ritualistic formula is required to assert the [fifth amendment] privilege [against self-incrimination] which is effectively invoked by any language which the court should reasonably be expected to understand as an attempt to claim the privilege.

State v. Bell, 112 N.H. 444, 446, 298 A.2d 753, 756 (1972) (Kenison, C.J.) (citing *Quinn*, 349 U.S. at 163, 75 S.Ct. at 673); *see Securities and Exchange Comm. v. Howatt*, 525 F.2d 226, 230 (1st Cir. 1975) (citing *Quinn*, 349 U.S. 155, 75 S.Ct. at 668). And in determining whether the privilege has been invoked, the "entire context in which the claimant spoke must be considered." *United States v. Goodwin*, 470 F.2d at 902.

[3] The third basic principle is that application of the privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime. "The right to remain silent, unlike the right to counsel, attaches before the institution of formal adversary proceedings." *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987). The privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. . . ." *Kastigar v. United States*, 406 U.S. 441, 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972); *cf. Hoffman v. United States*, 341 U.S. at 486-87, 71 S.Ct. at 818-19 (viability of the privilege depends on whether a responsive answer to the question might result in harmful disclosure); *In re Kave*, 760 F.2d at 354 (witness in a master's inquiry may invoke the privilege if there is a "reasonable possibility of prosecution"). With these principles as a starting point, we turn to the New Hampshire Supreme Court opinion.

To begin with, we respectfully disagree with the New Hampshire Supreme Court's obervation that

> *pre-Miranda* express refusals to confess . . . may be admitted without compromising the interests addressed by the fifth amendment, even assuming that the fifth amendment could be held applicable to prearrest silence, *see Jenkins v. Anderson*, *supra* at 236 n. 2, and at 242, [100 S.Ct. at 2128 n. 2 and at 2131] (Stevens, J., concurring), or to bar evidence of such silence in the State's case in chief.

Coppola, 130 N.H. at 153, 536 A.2d at 1239. In *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed. 2d 86 (1980), the Court held that "the use of prearrest silence to impeach a defendant's credibility does not violate the Constitution." *Id.* at 240-41, 100 S.Ct. at 2130-31. In *Jenkins*, the prearrest silence was just that: Defendant claimed at trial that he had stabbed the victim in self-defense, but he had failed to say anything to

anybody about the stabbing or report the victim's death for two weeks. His silence was used to impeach his trial assertion of self-defense. In the case at bar, we are concerned with the use of a statement made by a suspect and used by the prosecutor in his case in chief, not the use of silence to impeach the defendant's credibility.

Our next disagreement with the New Hampshire court is its statement that if petitioner "had couched his refusal in terms of speech versus silence, it might be arguable that he was claiming a constitutional warrant for his action." *Coppola*, 130 N.H. at 152, 536 A.2d at 1239. This runs counter to the liberal interpretation that should be accorded invocation of the privilege and the principle that a claim of the privilege does not depend upon any special combination of words. The cases discussed *infra* makes it clear that the protection of the privilege does not depend on a semantic formula.

Our most emphatic difference with the New Hampshire Supreme Court focuses on its statement: "By describing his choice as a refusal to confess, he implied that he had done something to confess about. It was this implication that took the defendant's retort outside the realm of allusions to the fifth amendment and affirmatively indicated his consciousness of guilt." *Coppola*, 130 N.H. at 152-53, 536 A.2d at 1239. This language amounts to a rule of evidence whereby an inference of consciousness of guilt will trump a fifth amendment claim of the privilege. Any refusal to speak, no matter how couched, in the face of police interrogation, raises an inference that the person being questioned probably has something to hide. Under the reasoning of the New Hampshire court any prearrest invocation of the privilege, no matter how worded, could be used by the prosecutor in his case in chief because it raises an inference of guilt. Such logic ignores the teaching that the protection of the fifth amendment is not limited to those in cus-

tody or charged with a crime. *See* cases *infra*. The words of a former great judge of this circuit, Chief Judge Magruder, bear repeating:

> Our forefathers, when they wrote this provision into the Fifth Amendment of the Constitution, had in mind a lot of history which has been largely forgotten today. See VIII Wigmore on Evidence (3d ed. 1940) § 2250 *et seq.*; Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1 (1949). They made a judgment and expressed it in our fundamental law, that it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused. The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application. *Hoffman v. United States*, 1951, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118. If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion.

Maffie v. United States, 209 F.2d 225,227 (1st Cir. 1954). If the implication of guilt takes the refusal to confess "outside the realm of allusions to the fifth amendment," *Coppola*, 130 N.H. at 152-53, 536 A.2d at 1239, we believe that the equally persuasive implication that a constitutional right was being asserted brings it right back in.

We close our critique of the opinion of the New Hampshire Supreme Court by noting that it characterized petitioner's statement as a "taunt to the police," a "defiant remark" betraying petitioner's "sophistication." *Coppola*, 130 N.H. at 150-52, 536 A.2d at 1238-39. We do not quarrel with the court's charac-

terization but wonder what bearing it has on the question whether petitioner effectively invoked his privilege against self-incrimination.

IV. DID PETITIONER EFFECTIVELY INVOKE THE PRIVILEGE AGAINST SELF-INCRIMINATION

[4] The statement by petitioner was made in the context of a precustodial interrogation of a suspect in a criminal investigation. The police had already questioned petitioner at his home on the day of the crime. Three days later, after learning that his friends has been questioned and being told that he was a suspect in the crime, two uniformed state troopers returned to petitioner's home for further questioning. Petitioner appeared to be nervous, pacing back and forth and walking away from the troopers. The trooper who wrote down petitioner's statement acknowledged that he and the other trooper went to Coppola's residence to elicit a confession and that he understood the statement to mean that Coppola did not want to confess.

In response to the state trooper's questions, petitioner stated: "Let me tell you something. I'm not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island and if you think I'm going to confess to you, you're crazy." As we read the statement, Coppola was telling the state police two things: that he was not going to confess; and that he knew he had a right not to incriminate himself. We agree with the New Hampshire court that petitioner was boasting of his sophistication in the ways of criminal interrogations. Coppola, in effect, told the police that he knew they were looking for a confession and that he knew from street experience that he had the right not to say anything that would incriminate him. That the words used were boastful and arrogant does not change their plain meaning.

We think it significant that immediately after making the statement and being told by the trooper that "I just want to give you your rights and then talk to you," petitioner said that he would not talk to the police without a lawyer. This shows that petitioner, presumably on the basis of his "street smarts," knew that he had a right to be represented by counsel at any interrogation.

We find, contrary to the New Hampshire Supreme Court, that petitioner's statement invoked his privilege against self-incrimination. The next issue is its admissibility.

V. THE ADMISSIBILITY OF PETITIONER'S STATEMENT IN THE PROSECUTOR'S CASE IN CHIEF

[5] We think that the issue presented by the admission of petitioner's statement is essentially the same as those addressed in cases defining the boundaries for prosecutorial comment on a defendant's exercise of the fifth amendment privilege against self-incrimination. These decisions control the issue despite several distinguishing facts in the instant case. Although the statement at issue in this case came in through police testimony and not through a comment by the prosecution, it is nonetheless evidence that came before the jury through the efforts and design of the prosecution. And while the trooper's testimony does not relate to a failure to testify or to post-*Miranda* silence, the disclosure of the words petitioner used to claim his privilege results in the same dilemma addressed in the comment cases: how to accommodate a search for the truth without undermining the purpose of the fifth amendment.

The broad rule of law we take from the line of cases beginning with *Raffel v. United States*, 271 U.S. 494,46 S.Ct. 566, 70 L.Ed. 1054 (1926), is that where a defendant does not testify at trial it is impermissible to refer to any fifth amendment

rights that defendant has exercised. *Raffel* involved a second trial. The question was: "Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial." *Id.* at 496, 46 S.Ct. at 567. The Court held that since a defendant takes the stand, "he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue." *Id.* at 497, 46 S.Ct. at 567-68. The Court concluded by stating: "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Id.* at 499, 46 S.Ct. at 568.

In *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106 (1965), it was held that "the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."

This circuit has been vigilant in enforcing this rule. *See United States v. Elkins*, 774 F.2d 530, 535-40 (1st Cir. 1985); *United States v. Skandier*, 758 F.2d 43, 45 (1st Cir. 1985); *United States v. Cox*, 752 F.2d 741, 745-46 (1st Cir. 1985); *Desmond v. United States*, 345 F.2d 225,226-27 (1st Cir. 1965).

The Court held in *Harris v. New York*, 401 U.S. 222,91 S.Ct. 643, 28 L.Ed.2d 1 (1971), that a statement made by defendant to police that was inadmissible in the prosecution's case in chief because of lack of procedural safeguards required under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), could be used on cross-examination to impeach defendant's credibility. In the course of its opinion, the Court stated: "Every criminal defendant is privileged to testify in

his own defense, or refuse to do so. But that privilege cannot be construed to include the right to commit perjury." *Id.* 401 U.S. at 225, 91 S.Ct. at 645.

The next case is one which the New Hampshire Supreme court referred to in its opinion, *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). *Doyle* proscribed the use of defendant's post-*Miranda* silence to impeach on cross-examination his exculpatory story told for the first time at trial. The Court concluded that "use of the defendant's post-arrest silence in this manner violates due process. . . ." *Id.* at 611, 96 S.Ct. at 2241. *Doyle*, strictly speaking, does not directly involve the fifth amendment privilege against self-incrimination. We include it because it has some bearing on the issue before us and because of the New Hampshire court's reference to it, and its partial quote from the sentence: "Thus, every post-arrest silence is *insolubly ambiguous* because of what the State is required to advise the person arrested." *Id.* at 617, 96 S.Ct. at 2244 (emphasis added).

We have already discussed *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, and only repeat the holding: "We hold that *impeachment* by use of prearrest silence does not violate the Fourteenth Amendment." *Id.* at 240, 100 S.Ct. at 2126 (emphasis added). Even if the word "silence" is construed to mean a spoken invocation of the privilege against self-incrimination, which was not at all involved in the case, *Jenkins* speaks only to the use of prearrest silence for impeachment.

We have found no cases by the United States Supreme Court holding or suggesting that a prearrest statement by a suspect during police interrogation that he is not going to confess can be used by the prosecutor in his case in chief. The New Hampshire Supreme Court has cited no cases standing for the proposition that prearrest silence or an invocation of the privilege can be used by the prosecutor in his case in chief.

In the case at bar, petitioner stated that he was not going to confess. He followed this with a statement that he would not answer any questions without a lawyer present. He did not later take the stand and offer an exculpatory story which his statement would impeach. Petitioner relied on the protection guaranteed by the fifth amendment from the first police interrogation through trial. Petitioner's constitutional rights were violated by the use of his statement in the prosecutor's case in chief. The next and final issue is whether the use of the statement was harmless error.

HARMLESS ERROR

[6] Our harmless error analysis is made in accord with the teachings of the Court: "Since *Chapman*, [*Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)] the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and ignore errors that are harmless, including most constitutional violations, see, *e.g.*, *Brown*, *supra*, [411 U.S. 223] at 230-232, [93 S.Ct. 1565, 1569-1570, 36 L.Ed.2d 208 (1973)]; *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed. 2d 1 (1972)." *United States v. Hasting*, 461 U.S. 499, 509, 103 S.Ct. 1974, 1980, 76 L.Ed. 2d 96 (1983).

We summarize the evidence. The victim was unable to make a courtroom identification of petitioner "because it was too dark, and I didn't have any glasses on." She gave the following description of her assailant: he was a lean man about five foot five in height; he was not Anglo-Saxon, "maybe Puerto Rican or French or something"; his hair was thick, dark and curly; he had about a day's growth of beard on his face; "I believe he had a mustache"; he had hair on his chest; his hands "felt unclean"; he was wearing a poplin-type jacket and as he left it sounded as if he had on heavy leather boots; there was a smell of cigarettes and alcohol on his breath.

A friend of petitioner's and a police officer who spoke with petitioner the night of the crime testified that this description fit petitioner.

The police officer also noticed what appeared to be a new Band-Aid on petitioner's left index finger. When asked about it, petitioner said that he had cut his hand earlier working on his car. The officer also observed that petitioner's hands were clean "but with a grease residue."

The victim testified that she saw a small dark-colored car parked across the street from her house. It was a moonlit night. Petitioner left Manchester at about 11:15 p.m. to drive home to Barnstead. The crime took place in Epsom, New Hampshire, which is between Manchester and Barnstead. He was driving his burgundy Saab which he had worked on earlier that day. At 12:52 a.m. a police officer on his way to the scene of the crime saw a small burgundy car heading north on Route 28. The officer noticed that the driver had a mustache. He also noticed that the first three digits of the license plate was 300. The license plate number on the petitioner's Saab was 300342. When the police went to petitioner's house in Barnstead at about 2:30 a.m., the hood of the Saab was still warm.

According to the victim, she had gone to bed about 11:20 p.m. She was wakened by a thump on the front door at 12:14 a.m. Her assailant entered the house, dragged her into the bedroom, tore her clothes off, took his clothes partially off and raped her. She estimated that the assailant was in the house 30 to 40 minutes.

An expert in serology, Kevin B. McMahon, testified that 32% of the adult population of the country, male and female, can be classified as "A Secretors." This means that their body fluid secretions fall into this category. Body fluid secretions are found, *inter alia*, in semen and blood. An examination of

the semen taken from the vagina of the victim showed that it was from an "A Secretor." An examination of a blood sample taken from petitioner showed that he was an "A Secretor."

Three jail inmates who met petitioner during his pretrial detention testified for the state. Donald McConnell testified that petitioner told "me that the night that it happened he kicked down a door and he went in and grabbed the lady and he threw her down. And he was armed with a M-16 rifle." He further testified: "Well I asked him at one point if he was, in fact, admitting committing the rape of the victim. He never told me that he did. The only thing that he did mention was 'What did I have to lose?' And that was the extent of it." The state says in its brief at page 21 that "McConnell received no favorable treatment or promises from the state as a result of his testimony." (Tr. p. 550). We have read the transcript carefully, and there is no evidence to support this statement at page 550 or 551. On page 542, McConnell testified that his attorney had worked out a plea bargain on the charge facing him (escape from jail) and that there would be a hearing on the plea bargain on November 10, which was subsequent to his testimony at petitioner's trial. On page 546 of the transcript, McConnell testified that no promises were made to him by the prosecutor for testifying.

Inmate James Torrence testified: "Well, he said he broke the window with his hand, cut his hand (inaudible), grabbed the lady by the blouse and ripped it open and her tits fell out." Torrence was asked if he was getting anything in return for testifying and he answered "No."

On direct examination, inmate William Clapper testified as follows:

Q What did he tell you he was charged with?
A Rape.
Q And did he tell you about the facts of the charge?

A Yes.
Q What did he say?
A He told me that a guy owed him some money. And he went to pick it up (inaudible).
Q He said that was the facts of the charge pending against him?
A He said that's what he did.

...

Q And did he tell you what time of day it happened?
A It happened about 1:00 o'clock at night.
Q And what else did he tell you about it?
A That his car—that a maroon subcompact car was seen across the road and that he has one. And he was seen a little while later on the Webster Road a little while after it happened, that—by a Pittsfield police officer.

...

Q Did he talk about his shoes?
A One time we had been talking about boots they took from him for evidence (inaudible). He said he had a pair of them just like them, took them to work with him, put them in the car, and (inaudible).

On cross-examination Clapper testified in greater detail as to what petitioner told him: Petitioner was "running" cocaine to some people in Epsom (the scene of the crime) who were "fronting" it for him. Clapper explained that this means that petitioner was delivering cocaine to retailers and the retailers did not pay for it until after they sold it. The victim was one of those "fronting" cocaine for the petitioner and she owed him seventy thousand dollars. Petitioner went to her house on the night in question armed with an M-16 rifle. The victim's boyfriend was there. Petitioner went after the boyfriend for the money and in the process pushed or threw the victim out of the way. Clapper was emphatic that he did not tell the state trooper who questioned him at the jail that petitioner had said

he had raped the woman; petitioner told Clapper only that he had pushed or threw her aside in an effort to get at her boyfriend.

It must be explained here that Clapper had made a statement to one of the jail officials that was tape recorded. Although the record does not state so explicitly, it is clear that defense counsel had been given a copy of the statement. It can be fairly concluded that Clapper's cross-examination testimony tracked his recorded statement.

At the time Clapper gave his statement to the jail official he had decided to plead guilty to seven burglary charges. His attorney had negotiated a plea bargain, or was in the process of trying to negotiate one, under which the state would recommend a two-year sentence to be served in the house of correction. Clapper testified that this meant he would be incarcerated for 16 months. At the time Clapper testified, the plea agreement had not been approved by the court. Clapper further testified that the prosecutor had told him that he would not be getting any reward for testifying. When asked by the prosecutor why he was testifying, Clapper replied: "Because I want to be a good citizen."

The defense adduced testimony by a Richard Horan who is in the business of repairing, selling and servicing foreign cars that at the time of the crime petitioner's car was leaking about a quart of transmission fluid a day. There was testimony by Sergeant Sparks of the State Police that he had examined the area where petitioner's car had been allegedly parked during the crime and found nothing unusual. Sparks made the examination shortly after he had arrived at the victim's house in response to her telephone call reporting the crime.

An analysis of the hair found at the scene showed that it all came from the victim. No fingerprint evidence was introduced.

Petitioner was not arrested until six weeks after the crime. His arrest was prompted by a telephone call from the victim to a state trooper stating "he's come back." The trooper immediately went to the victim's house. He found footprints in the snow. The footprints led to the front door, then to a spare bedroom window, back to the front of the house and then to a window in the living room area. The trooper estimated the shoe size of the person making the prints to be eight and a half, the trooper's own shoe size. Petitioner wears size eight shoes.

Although the harmless error question is close, we cannot conclude that the admission of petitioner's statement was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824. Our review of the record, leaving aside the statement, does not make it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty. *United States v. Hasting*, 461 U.S. at 5120-11, 103, S.Ct. at 1981. This is certainly not a case of "overwhelming evidence of guilt." *Milton v. Wainwright*, 407 U.S. at 377, 92 S.Ct. at 2177078. The testimony of the three jail inmates raises serious questions of credibility. There are gaps in the identification evidence, not large, to be sure, but large enough to raise a reasonable doubt. There is no conclusive evidence that ties petitioner tightly to the crime. Based upon the evidence without the statement, it is probable that petitioner committed the crime. But that is not the test. We do not know what role petitioner's statement played in the jury's deliberations. The statement may have been the clincher; it was, therefore, not harmless.

The decision of the district court is reversed. The writ shall issue unless the State of New Hampshire, within sixty days, shall take the necessary steps to retry petitioner.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Vincent Coppola
v.
Ronald L. Powell, Commissioner,
Department of Corrections, et al.

#C88-373-L

ORDER ON MOTION TO DISMISS

The petitioner, Vincent Coppola, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Following a jury trial in the Merrimack County Superior Court, the petitioner was found guilty on one count of burglary and two counts of aggravated felonious sexual assault. The petitioner was subsequently sentenced to serve a total of twenty to sixty years of imprisonment. On appeal, the New Hampshire Supreme Court affirmed the convictions but remanded for reconsideration of the sentences. *See State* v. *Coppola*, 130 N.H. 148 (1987). The Superior Court reduced the petitioner's sentence to thirteen to thirty-six years of imprisonment on remand.

The petitioner seeks relief claiming that the trial court erred by admitting into evidence the petitioner's assertion of his privilege against self-incrimination when he was questioned by the police during their investigation. The respondents have moved for dismissal of the petition on the grounds that the petitioner's statement was not an invocation of his privilege against self-incrimination and that, even if it was, the fifth and and fourteenth amendments did not require suppression of the petitioner's statement.

The relevant facts are as follows: The female victim was attacked early in the morning of January 25, 1986 and called the police shortly thereafter. After listening to the victim, the police suspected the petitioner and spoke with him at his house,

the same morning. Later, the police returned to the petitioner's home and asked to speak with him again. The petitioner responded with the statement that is the basis for this petition: "Let me tell you something. I'm not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. And if you think I'm going to confess to you, you're crazy." Nonetheless, the petitioner made some further statements to the police at that time.

The petitioner was not arrested until March 6, 1986. At his trial, the police testified as to the petitioner's statement to them, over the petitioner's objection. The petitioner did not testify at the trial.

Upon review, the New Hampshire Supreme Court upheld the admission of the petitioner's statement. *Coppola*, 130 N.H. at 150-53. First, the court ruled that use of a defendant's pre-arrest silence in response to police questioning is not barred where the silence was not induced by implicit government assurances, such as *Miranda* warnings, that the silence would not be used against the defendant. *Id.* at 152 (citing *Jenkins* v. *Anderson*, 447 U.S. 231, 240 (1980)).

Next, the New Hampshire Supreme Court ruled that the petitioner's statement could not be equated with an invocation of his constitutional right to remain silent. The court stated, "his statement cannot be read as a mere assertion that he, unlike a bumpkin, would not talk; he claimed, rather, that the police were crazy to think that someone of his sophistication would confess." *Coppola*, 130 N.H. at 152.

The court agrees that the petitioner's statement was not an assertion of his fifth amendment rights. The petitioner did not say that he did not want to talk with the police or that the police were crazy to think that the petitioner would talk to them. Either of these *might* be understood as attempts to assert the privilege against self-incrimination. Instead, the peti-

tioner discussed his sophistication and then stated that the police were crazy to think that he would confess to them. This suggests that the police, in the petitioner's opinion, would be wasting their time by questioning him, since they would not obtain any incriminating statements. It does not indicate that the petitioner was refusing to answer questions. The petitioner's comments do not suggest that he was thinking about the fifth amendment, only that he was too "street-smart" to say anything that could be construed as a confession.

If the petitioner was trying to invoke his constitutional rights, some reference to those rights or at least a statement that he was not required or did not want to talk to the police would be expected. By emphasizing his sophistication and that the police therefore were crazy to think he would confess, the petitioner cannot be understood as having attempted to invoke his privilege against self-incrimination. As a result, his statement properly could be used at his trial.

Accordingly, the respondent's motion to dismiss is hereby granted and the petition for a write of habeas corpus is denied.

November 30, 1988.

/s/ Martin F. Loughlin

Martin F. Loughlin
U.S. District Judge

James E. Duggan, Esq.
Tina Schneider,
Assistant Attorney General

Merrimack
No. 87-004

THE STATE OF NEW HAMPSHIRE

v.

VINCENT COPPOLA

December 7, 1987

1. **Constitutional Law — Self-Incrimination — Particular Cases**

At trial for burglary and sexual assault, court properly admitted into evidence defendant's pre-arrest statement to the police claiming, in effect, that the police were crazy to think that someone of his sophistication would confess, where the statement was not an invocation of defendant's right to remain silent.

2. **Evidence — Hearsay — Excited Utterance Exception**

At trial for burglary and sexual assault, court's admission of victim's statements to police investigators at the scene of the crime on the ground that the victim had previously taken the stand and been subject to defendant's cross-examination was not reversible error, since, although the Rules of Evidence contain no such exception to the hearsay rule, the statement was admissible as an excited utterance. N.H. R. Ev. 803(2).

3. **Evidence — Hearsay — Excited Utterance Exception**

Guarantee of trustworthiness that justified admission of a hearsay statement as an excited utterance flows from the declarant's excitement, which is inconsistent with a state of mind disposed to contrive or misrepresent; declarant's spontaneity is the requisite condition that removes a statement admissible under the excited

utterance exception to the hearsay rule from the "mere narrative" that the rule would bar from evidence.

4. Criminal Law — Sentence — Governing Law

Purpose of pretrial notice requirement under statute authorizing extended terms of imprisonment is to give the defendant an opportunity to offer evidence to refute the findings required by the statute. RSA 651:6, II.

5. Criminal Law — Sentence — Governing Law

Although a prosecutor will be prudent to specify the applicable criteria for extended sentences under the statute authorizing extended terms of imprisonment, as part of the prosecutor's pre-trial notice, the failure to so specify will not render the statute inapplicable in the absence of actual prejudice. RSA 651:6.

6. Criminal Law — Sentence — Evidence

Court erred at sentencing hearing in admitting evidence that in two instances a prowler was active in a town when defendant lived there, where the evidence was insufficient to prove that the defendant was the culprit; even through such evidence justified strong suspicion that the defendant was the culprit, it did not carry suspicion to the point of probability.

7. Criminal Law — Sentence — Evidence

When incompetent evidence was admitted at sentencing hearing and may have been given some weight in deciding the appropriate level of the sentences, case was remanded for reconsideration of sentences imposed.

Stephen E. Merrill, attorney general (*Robert B. Muh*, assistant attorney general, on the brief and orally), for the State.

James E. Duggan, appellate defender, of Concord, by brief and orally, for the defendant.

SOUTER, J. A jury trial in the Superior Court (*Bean, J.*) resulted in the defendant's convictions on one count of burglary, RSA 635:1, and two counts of aggravated felonious sexual assault, RSA 632-A:2. He was sentenced under RSA 651:6, II(a) to consecutive extended terms of imprisonment totaling twenty to sixty years for the assaults, and to a further, but suspended, consecutive term of three and one-half to seven years for the burglary. In this appeal, the defendant advances four claims of trial court error: (1) in admitting his pre-arrest statement to the police; (2) in admitting the victim's statement to police investigators at the scene of the crime; (3) in imposing extended terms of imprisonment under RSA 651:6 despite the county prosecutor's failure to specify before trial which of several possible statutory grounds he would rely upon in seeking the enhanced penalties; and (4) in considering circumstantial evidence of prior bad acts by "giv[ing] it such weight as... it deserve[d]." We sustain the convictions but remand for reconsideration of the sentences.

The female victim lived alone in Epsom, where she was awakened at 12:14 a.m. on January 24, 1986, by a thumping sound on her front door. She got up to see what was the matter, and as she stook near the source of the noise a hand broke through a glass panel from outside, unfastened the lock and opened the door. A man entered and struggled with victim, whom he overpowered, dragged to the bedroom and stripped of her night clothes. After the intruder had forceably engaged in cunnilingus and intercourse with the victim, he dressed himself and left about 12:45 or 12:50 after threatening further harm if the victim reported the crime.

The victim was not deterred and telephoned the police. One officer who arrived at the house about 1:00 a.m. described the victim as "very upset and excited," and another spoke of her as "very hysterical, [having] a very hard time talking to the

trooper [who] had a hard time calming her down." The victim herself later recalled her responses to the police as "just kind of raving on...." About 1:15 a.m., the victim was able to tell what had happened, and she gave an account that she substantially repeated at trial.

After listening to the victim describe both her assailant and a car that she had seen near her house when the assailant left, the police focused their suspicion on the defendant. About 2:30 a.m., the police arrived at the defendant's house and spoke with him and his wife. After further investigation, the police returned to the defendant's house that evening and asked him to talk with them again. "Let me tell you something," he replied. "I'm not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. And if you think I'm going to confess to you, you're crazy." The defendant nonetheless made some further statements, which were not admitted into evidence, and showed the police some clothing for examination in light of the victim's statement.

The defendant remained free, however, until March 6, 1986, the day on which the victim reported that she had found fresh footprints in the snow around her house. When the prints turned out to be about the size that the defendant would have made, he was arrested, charged with the January crimes and committed to the Merrimack County Jail.

Although the defendant did not testify at the ensuing trial, his defiant remark to the police was received into evidence, and his challenge to the admissibility of this statement presents the first issue here on appeal. In the trial court, the defendant did not rest his claim on any tenet of State constitutional law, *see State v. Dellorfano*, 128 N.H. 628, 633, 517 A.2d 1163 (1986), and he relies here on the fifth and fourteenth amendments of the Constitution of the United States, as applied in a trilogy of cases dealing with the conditions under which a defendant who takes the stand in his defense may be impeached by his prior silence. *Doyle v. Ohio*, 426 U.S. 610 (1976), held that the requirement of fundamental fairness in-

herent in the due process guarantee bars the State from impeaching a defendant with evidence that he remained silent after arrest and *Miranda* warnings. The Court reasoned that such silence is insolubly ambiguous and arguably responsive to the assurance implicit in the warnings, that a choice to exercise the constitutional right to silence will carry no penalty. *Id.* at 617-18. Next, the defendant relies upon *Jenkins v. Anderson*, 447 U.S. 231 (1980), which explained *Doyle* by holding that the fifth and fourteenth amendments raise no bar to impeachment by otherwise probative evidence of pre-arrest, pre-*Miranda* silence, where there has been no governmental inducement, such as *Miranda* warnings, to exercise the privilege of remaining silent. Finally, the defendant cites *Fletcher v. Weir*, 455 U.S. 603 (1982), which held that there is no fourteenth amendment bar to a defendant's impeachment by evidence of post-arrest but pre-*Miranda* silence, where again the government has given no affirmative assurance, like *Miranda* warnings, that the choice to keep silent will carry no adverse consequences.

From these cases, the defendant proceeds by two lines of reasoning. In the first, he argues that his boast to be Rhode Island street-wise was tantamount to an invocation of his fifth amendment privilege to remain silent, which he claims was induced by the police when they asked to question him in his house. From this it follows for him that fundamental fairness espoused in *Doyle* and explained in *Jenkins* forbids any evidentiary use of his statement.

In his second line of thought, the defendant points out that *Jenkins* and *Fletcher* involved nothing more than proof of silence to impeach a defendant who had testified, and he argues that the cases implicitly teach that introducing evidence of pretrial silence against a defendant who maintains his silence throughout his trial offends fifth amendment standards. If we understand the defendant's reasoning, it begins, once again, with the assumption that his statement was equivalent to an invocation of his right to stay silent, which is an ambiguous act

for the reason that silence may, but does not necessarily, reflect mere consciousness of guilt. Presumably, the defendant is concerned that the presentation of evidence of such silence as part of the State's case in chief would impermissibly burden his exercise of the privilege to remain silent at trial. For if he relied on that privilege, he would necessarily waive his opportunity to explain that his pre-arrest silence was itself the exercise of his constitutional privilege or was, for some other reason, free from any implication of guilt. The defendant suggests, indeed, that the evidentiary use of his choice to remain silent at his house would be as offensive to the fifth amendment as a prosecutor's comment on a defendant's choice to remain silent at the trial itself. *See Griffin v. California*, 380 U.S. 609, 615 (1965). *But see, e.g., Jenkins v. Anderson, supra* at 236 (the Constitution does not forbid every governmentally imposed choice that may discourage the exercise of a constitutional right).

Neither line of reasoning is sound, however. The first rests on a misreading of the cases cited. While *Jenkins* did indeed explain that *Doyle* barred impeachment evidence of a defendant's silence after the government had given an implicit assurance that could be understood as inducing that silence, *see Jenkins v. Anderson*, 447 U.S. at 240; *see also Anderson v. Charles*, 447 U.S. 404, 407-08 (1980); *Fletcher v. Weir*, 455 U.S. at 606-07, the present defendant would expand *Jenkins* beyond recognition by equating any occasion to remain silent in response to police questioning with an inducement requiring the application of *Doyle*. Neither *Jenkins* nor *Doyle*, however, supports the defendant's assumption that police questioning, standing alone, may reasonably be regarded as an inducement to silence, so as to render evidence of such silence inadmissible. It is noteworthy that the *Jenkins* majority premised its fifth amendment analysis on *Raffel v. United States*, 271 U.S. 494 (1926), which held that evidence of a defendant's silence at a prior trial was admissible to impeach his testimony at retrial, *Jenkins v. Anderson, supra* at 236; if the jeopardy of a

trial is not an inducement sufficient to implicate *Doyle*, then certainly mere pre-arrest questioning must be inadequate to do so. Indeed, *Jenkins* explained that a defendant's silence would be inadmissible to impeach, not because it occurred on an occasion provided by the police, but because it followed some affirmative assurance, like the implication of *Miranda*, that silence would carry no penalty. *Jenkins v. Anderson*, *supra* at 240. Nothing could be further from such an assurance than a request, unaccompanied by an *Miranda* warning, that the defendant talk to the police.

[1] A more significant flaw, however, infecting each of the defendant's lines of reasoning, is the factual unreality of equating his taunt to the police with an invocation of his constitutional right to remain silent. If he had couched his refusal in terms of speech versus silence, it might be arguable that he was claiming a constitutional warrant for his action. But his statement cannot be read as a mere assertion that he, unlike a bumpkin, would not talk; he claimed, rather, that the police were crazy to think that someone of his sophistication would confess. By describing his choice as a refusal to confess, he implied that he had done something to confess about. It was this implication that took the defendant's retort outside the realm of allusions to the fifth amendment and affirmatively indicated his consciousness of guilt. While post-*Miranda* invocations of a right to silence are insolubly ambiguous, *see Doyle*, *supra* at 617, pre-*Miranda* express refusals to confess are not. They may be admitted without compromising the interests addressed by the fifth amendment, even assuming that the fifth amendment could be held applicable to pre-arrest silence, *see Jenkins v. Anderson*, *supra* at 236 n.2, and at 242 (Stevens, Jr., concurring), or to bar evidence of such silence in the State's case in chief.

The defendant raises a second evidentiary issue by pressing his objection to admitting the victim's statement to the police who interviewed her at her house after the rape. After the

victim had testified at trial, the State called a State police officer to the stand to repeat the substance of the victim's account of the crime as she had described it in response to questions the officer had addressed to her some thirty minutes after the attack. The victim's description was not offered in rebuttal to any evidence of a prior statement inconsistent with her testimony at trial, *see* N.H. R. Ev. 801(d)(1)(B), and the defendant objected that the victim's prior consistent statement was inadmissible as hearsay. After the trial court overruled the objection on the ground that the victim had previously taken the stand and had been subject to the defendant's cross-examination, the trooper summarized the victim's original account of the events in question, which agreed with her testimony at trial.

[2] Although the defendant is correct that the Rules of Evidence contain no general exception to the hearsay rule for prior statements of witnesses who have been, or still are, subject to cross-examination, it does not follow that the admission of the prior consistent statement was reversible error. Rather, the statement was so certainly admissible as an excited utterance, that there was no error in the receipt of the testimony. *See State v. Goulet*, 129 N.H. 348, 351, 529 A.2d 879, 881 (1987).

[3] New Hampshire Rules of Evidence 803(2) describes an excited utterance that may be admitted despite the general rule against hearsay as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The guarantee of trustworthiness that justifies admission of such a statement flows from the declarant's excitement, which is inconsistent with a state of mind disposed to contrive or misrepresent. *See Semprini v. Railroad*, 87 N.H. 279, 280, 179 A. 349, 350 (1935). The declarant's spontaneity, then, is the requisite condition that removes a statement admissible under Rule 803(2) from the sort of "mere narrative" that the hearsay

rule would bar from evidence. *State v. Martineau*, 114 N.H. 552, 558, 324 A.2d 718, 722 (1974).

These conditions for receipt of the statement were satisfied. The startling character of the experience described by the victim in this case is not open to question, and the record would not support any serious doubt that she was in a state of excitement when she described that experience to the police. The evidence was uncontradicted that the victim's interview by the police began not more than half an hour after the rapist had left. Two police officers described the victim immediately before the interview as upset, excited and hysterical, and she herself testified that she was virtually "raving" about what had happened to her. She had just received first aid for a serious cut suffered in trying to fend off her assailant, and as soon as the interview was over she was taken off to the hospital. Under such circumstances the fact that the victim gave her statements in answer to questions is in no way inconsistent with the probable spontaneity of her responses, *see State v. Kenna*, 117 N.H. 305, 374 A.2d 427 (1977), and nothing in the record casts any doubts on admissibility under Rule 803(2).

The remaining issues bear not on the question of guilt or innocence but on the propriety of the sentences. The defendant challenges the imposition of extended terms of imprisonment under RSA 651:6 on the ground that the prosecutor gave inadequate notice of his intent to request application of the statute. RSA 651:6, II authorized a sentencing court to impose an extended term of imprisonment on two conditions. First, the facts must satisfy one of the substantive criteria listed in paragraph 1, such as the defendant's serious dangerousness to others due to gravely abnormal mental condition, exceptional cruelty in inflicting death or serious bodily injury, and so on. *See* RSA 651:6, I(a) through (f). Second, "notice of possible application of this section [must be] given the defendant prior to the commencement of trial." RSA 651:6, II. Although the State gave timely notice of its intent to "recommend a sentence under RSA 651:6 upon conviction,"

the notice did not indicate which of the substantive criteria the prosecutor would rely on. It was not, in fact, until the trial was over and the sentencing hearing had begun that the State announced its intent to rely on RSA 651:6, I(c), authorizing an extended term if the defendant "has twice previously been imprisoned... on sentences in excess of one year." Thus the defendant argues that the State's notice to him was inadequate in its failure to specify the criterion that the prosecutor would invoke.

[4] This claim must be judged in light of the objective to be served by the pretrial notice, which is to "give the defendant an opportunity to offer evidence to refute the findings required by... the statute." *State v. Toto*, 123 N.H. 619, 625, 465 A.2d 894, 898 (1983). If, then, a defendant would have offered evidence at trial with a bearing on the basis later claimed for requesting an extended prison term, and if for some reason the defendant would have a substantially diminished opportunity to present such evidence at the hearing on his sentence, his prejudice should preclude the imposition of any extended term. Absent such prejudice, however, there is no reason to bar application of the statute simply because the notice of intent did not specify grounds.

[5] On this reasoning, there is no merit in the defendant's claim, for there is no prejudice apparent on the record before us. The defendant did not take the stand, and he would hardly have wished to acquaint the trial jury even with mitigating evidence of the circumstances that had led to prior imprisonments. Nor has he made even a claim that he would have had such evidence to offer at his sentencing hearing if he had been given earlier notice. Although we do not foreclose him from seeking to present such evidence when, for other reasons given below, this case is remanded for reconsideration of sentence, there is no ground apparent at this point for questioning the adequacy of the notice he received. In sum, a prosecutor will be prudent to specify the applicable criteria

for extended sentences under RSA 651:6, I, as part of his required pre-trial notice under paragraph II; but the failure so to specify will not render the statute inapplicable in the absence of actual prejudice.

The defendant's final assignment of error in sentencing rests on the trial court's reception of evidence at the sentencing hearing that in two instances a prowler was active in Franklin, when the defendant lived there in 1981. The testimony in question is remarkably confusing, but as we read the record, it boils down to this. The State established that the defendant had been charged and convicted of one act of criminal trespass and another of attempted burglary, each committed in Franklin in 1981. Over the defendant's objection, the State also presented testimony that during the same time period the defendant had been seen at a house in Franklin the day before it was burglarized, and that a small male with bushy hair, never identified, had been seen jumping from the porch roof of another house. The court received the evidence of the former incident without comment and said it would give evidence of the latter such weight as it deserved. We hold that none of this evidence should have been considered.

[6] Although the defendant argues that the issue is governed by *State v. Cote*, 129 N.H. 358, 375, 530 A.2d 775, 785 (1987), in which we held that a sentencing court could not find a pattern of criminal conduct based on acquittals, we believe that *Cote* is inapposite to the instant case, which is controlled by considerations of relevance. The evidence presented to the trial court was insufficient to prove that the defendant was probably the burglar in the first instance or the prowler in the second. To be sure, the record indicated that the defendant had committed other crimes in 1981 by conduct comparable to his appearance at the one house and to the unidentified man's departure from the roof of the other. And while we concede that the comparisons justify strong suspicion that the defendant was the culprit in each of the disputed instances, the evi-

dence does not carry suspicion to the point of probability in either. The trial judge should therefore either have sustained the objection to receipt of the evidence, or have indicated that he would give it no weight, once its speculative character was apparent.

[7] Because, however, the incompetent evidence may have been given some weight in deciding the appropriate level of the sentences, we remand for reconsideration of these sentences by the judge who imposed them. We do not suggest that the sentences must necessarily be modified, but we hold that they should be reduced if the trial judge would have imposed lesser sentences had he not assigned some weight to the evidence in dispute.

Convictions affirmed; remanded for reconsideration of sentences.

All concurred.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1109

VINCENT COPPOLA,
Petitioner, Appellant,
v.
RONALD L. POWELL, ETC., ET AL.,
Respondents, Appellees.

JUDGMENT

Entered: July 14, 1989

This cause came to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is reversed. The case is remanded to that Court with directions to issue the writ of habeas corpus unless, within 60 days from the date of this judgment, the State of New Hampshire shall take the necessary steps to retry petitioner.

By the Court:

FRANCIS P. SCIGLIANO, CLERK

By:
Chief Deputy Clerk

[cc: Mr. Duggan and Ms. Schneider]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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v.

RONALD L. POWELL, ETC., ET AL.,
Respondents, Appellees.

Before

Campbell, *Chief Judge*,

Bownes, Breyer, Torruella and Selya, *Circuit Judges*, and
Gray* *Senior District Judge*

ORDER OF COURT

Entered: August 15 1989

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc both be and the same hereby are denied.

By the Court:

FRANCIS P. SCIGLIANO, CLERK

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*Of the Central District of California, sitting by designation.

[cc: Mr. Duggan and Ms. Schneider]